UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN W. MCKISSICK and PATRICIA MCKISSICK, Plaintiffs, v. FOREVER CHEESE, INC. and WHOLE FOODS MARKET GROUP, INC., Defendants, and FOREVER CHEESE, INC., Third-Party Plaintiff, v. FATTORIE CHIARAPPA, S.r.l Third-Party Defendant.	Civ. Action No.: 12-cv-4634

THIRD-PARTY DEFENDANT FATTORIE CHIARAPPA, S.R.L.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION/MOTION FOR SUMMARY JUDGMENT

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Third-Party Defendant Fattorie Chiarappa S.r.l. (hereinafter "Chiarappa"), respectfully submits this Reply Memorandum of Law in support of its Motion for Summary Judgment.[1]

I. Preliminary Statement

Forever Cheese has presented only unfounded assertions that Chiarappa has been engaging in marketing and selling of cheese to New York for the last 15 years. Forever Cheese has presented no documentary evidence to support this claim; in fact, the documentary evidence relied on by Forever Cheese itself establishes the opposite. The documents unequivocally establish that Forever Cheese bought cheese from Chiarappa *in Italy*, ownership and possession transferred *in Italy*, and payment was made *in Italy*. Once arriving in the United States, all cheese bought in Italy was transferred to and stored in New Jersey, not New York. There is no evidence that the cheese ever touched any part of the State of New York.

For the reasons set forth above and explained in greater detail below, there is no general jurisdiction over Chiarappa as it has no continuous or systematic contacts with the State of New York. There is no specific jurisdiction over Chiarappa because it lacks contacts with New York and there was no reasonable expectation of consequences in New York. The sufficient minimum contacts required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution do not exist such that the Court can exercise jurisdiction over Chiarappa, and any such exercise of jurisdiction would offend traditional notions of fair play and substantial justice. Accordingly, Chiarappa is entitled to summary judgment that there is no personal jurisdiction over it and all of the claims against Chiarappa must be dismissed.

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[1] The motion was originally filed as a motion to dismiss, which the Court converted to a motion for summary judgment on August 21, 2013.

We first address the erroneous nature of Forever Cheese's proffered declarations which are unsupported by documentary evidence. We then address the inaccuracies in law as presented by Forever Cheese.

II. The Declarations by Forever Cheese Do Not Create a Triable Issue of Fact as to Personal Jurisdiction

Forever Cheese has the burden of presenting prima facie evidence that there is personal jurisdiction over Chiarappa. *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012). The Forever Cheese declarations do not cause Forever Cheese to meet its burden of proof. Forever Cheese has submitted the declarations of three of its employees in an attempt to demonstrate that Chiarappa has engaged in the marketing and sale of cheese to the State of New York. The Court should reject these declarations as self-serving, conclusory affidavits that are rebutted by documentary evidence. *BellSouth Telecommunc'ns Inc. v. W.R. Grace & Co. – Conn.*, 77 F.3d 603, 615 (2d Cir. 1996) (self-serving affidavits are insufficient to create a triable issue of fact).

A. Pierluigi Sini's Declaration Does Not Create a Triable Issue of Fact – There is No 15 Year History of Sales and Marketing to the State of New York

The declaration of Pierluigi Sini does not create a triable issue of fact because it is refuted by the documentary evidence. At the outset, the documentary evidence unequivocally demonstrates that the sales were completed in Italy and ownership and possession of cheese transferred to Forever Cheese in Italy. *See* Ex. A, Chiarappa Declaration, ¶¶ 3-8.

Sini's declaration is riddled with the unfounded legal conclusion that Chiarappa has been "selling and promoting its cheese to New York for the last 15 years." Sini and Forever Cheese have failed to produce any documents supporting this self-serving assertion. More importantly, they have failed to refute the documentary evidence which clearly demonstrates that any sales between Chiarappa and Forever Cheese took place in Italy, ownership and possession transferred in Italy and payment was made in Italy.

All cheese sold from Chiarappa to Forever Cheese was sold "FCA." "FCA" or "Free Carrier" mean that once the seller (Chiarappa) has delivered goods to a named place for transfer to a carrier, the costs for transportation, title to and risk of loss transfer to the buyer (Forever Cheese) after delivery to that carrier. *Wing Shing Prods. (BVI) v. Simatelex Manufactory Co.*, 479 F.Supp.2d 388, 394, n. 3 (S.D.N.Y. 2007) (FCA provides that upon delivery to the location designated by the buyer, "delivery is complete and the risk of loss or damage to the goods transfers from seller to buyer."); *see also* Ex. A, Chiarappa Declaration, ¶ 3. The marking "FCA" is present on all known invoices from Chiarappa to Forever Cheese and is a legal term that governs the transactions between the two entities. *See* Area "A" on Ex. 1 to Ex. A, Chiarappa Declaration.

Notably, Sini does not refute the definition of the term "FCA" or its application to this case in his declaration.

Here, numerous emails from Forever Cheese, and Sini himself, to Chiarappa demonstrate that Milan was the "FCA" location where ownership, possession and responsibility for the cheese transferred from Chiarappa to Forever Cheese. Ex. A, Chiarappa Declaration, ¶¶ 3-5, 8. For example, Exhibit D to Sini's declaration is an email dated May 5, 2008, from Sini to Marica Chiarappa requesting that certain amounts of ricotta be delivered to Milan by May 26th. *See* Ex. A, Chiarappa Declaration, ¶ 5. There are at least 70 emails from Sini to Chiarappa confirming Milan as the delivery location. *See* Ex. 2 to Ex. A, Chiarappa Declaration. Sini does not refute that the "FCA" location was Milan, Italy.

The cheese was transferred from G.T. Global Transport, S.R.L. of Via I Trav. Wagner, 1/A Putignano BA, Italy, to Forever Cheese's carrier, Italsempione Spedizioni Int. of Via E. Restelli, 5 20010-Vissuone, Italy, in Milan. *See* Areas "B" and "C", respectively, of Ex. 1 to Ex. A, Chiarappa Declaration.

The transfer of the goods from Chiarappa to Forever Cheese in Italy is further shown by the fact that all purchases were paid for by Forever Cheese via wire transfer to Chiarappa's bank in Italy and were made in Euros. See Area "E" on Ex. 1 to Ex. A, Chiarappa Declaration, ¶ 6. Thus, there is no question that all sales between Chiarappa and Forever Cheese occurred in Italy. No part of the transaction occurred in New York. Forever Cheese has failed to meet its burden of proof. *Licci,* 673 F.3d at 59.

Forever Cheese has ignored the "FCA" condition and the words used by Sini himself in his own correspondence regarding the transfer location of Milan by alleging that Chiarappa knew it was selling to New York because Forever Cheese's Long Island City, New York address is on the invoices. This argument is misleading to the Court and without merit.

As set forth in the Declaration of Frank Mazella, annexed hereto as Exhibit B, the address for Forever Cheese reflected on the invoices, 36-36 33rd Street, Long Island City, New York, appears to be nothing more than an office building. *Id.* That location does not have refrigeration facilities capable of receiving, housing and storing the quantities of cheese sold by Chiarappa to Forever Cheese in Italy. *Id.* Such a facility is, however, located at 136 Mohawk Street, Port Newark, New Jersey. *See* Declaration of Frank Ciano, Esq., annexed hereto as Exhibit C.

On November 27, 2012, Frank Ciano, Esq. met with counsel for Forever Cheese at Forever Cheese's storage facility in Port Newark, New Jersey. *Id.* The facility is a large warehouse comprised of several refrigerated rooms. *Id.* He was advised by counsel for Forever

Cheese, and/or Forever Cheese itself, that Forever Cheese uses 80% of one of the refrigerated rooms to store its cheese. *Id.* As represented by Forever Cheese's counsel, and/or Forever Cheese itself, at this meeting, Chiarappa delivers the cheese to Milan where it is sealed in refrigerated storage pods for shipping. *Id.* The pods are then loaded on a ship and ultimately transported to Port Newark, New Jersey for storage and further distribution throughout the United States. *Id.* The doors to the pod are sealed in Milan until the pods they arrive in New Jersey. *Id.* Thus, while the documentary evidence demonstrates that the sales are completed in Italy, the shipments, which Forever Cheese paid for and had complete control over, where ultimately made to New Jersey, not New York, for distribution throughout the United States. Chiarappa has no knowledge of where the cheese is distributed by Forever Cheese. Ex. A, Chiarappa Declaration.

Sini's representations regarding "hundreds" of emails and telephone calls between Chiarappa and Forever Cheese do not establish that sales were made to New York. Rather, the communications, the majority of which were Italian, show that the sales transaction where made and finalized in Italy. Ex. A, Chiarappa Declaration, ¶¶ 3-8. Any incidental connection to an address in Long Island City, New York, does not demonstrate that Chiarappa engaged in a persistent course of business in the State of New York.

Moreover, Sini's declaration that Chiarappa had a contract with Forever Cheese is simply not true. If such a contract existed, it should have been attached to Forever Cheese's opposition papers. No such contract is attached, because no such contract exists. Chiarappa did sell cheese to Forever Cheese in Italy for a number of years. The invoices representing those sales do not amount to a contract for the sale of goods between the parties in the manner alleged by Forever Cheese. Matteo Chiarappa's declaration that there is no contract between the two parties is accurate as declared, and the Court should disregard another of Forever Cheese's attempts to persuade it despite lacking any documentary evidence to support its claims.

Sini's declaration makes additional incomplete and inaccurate representations regarding his relationship with Chiarappa as an FDA agent. As evidenced by the facsimile received from Pierluigi Sini on November 3, 2003, Sini contacted Chiarappa regarding serving as the FDA agent in the United States. Ex. 4 to Ex. A, Chiarappa Declaration. Sini offered to serve as the agent and took all steps necessary to formalize that process. *Id.* This facsimile, authored by Sini himself, directly refutes Sini's current representations in his declaration that Chiarappa "took affirmative actions to appoint Sini as its FDA agent in the United States."

Moreover, any allegations regarding an FDA agent and serving as the same are irrelevant to the determination of jurisdiction. Notably, despite spending several paragraphs of Sini's declaration devoted to the topic of FDA agent, Forever Cheese has presented no case law which stands for the proposition that having an agent with a *federal* agency such as the FDA is sufficient to confer jurisdiction over an entity in the State of New York. Forever Cheese has not presented any such case law, because no such case law exists. Similarly, there is no case law which suggests that presenting health certificates, in Italian and English, along with each Italian purchase of cheese somehow confers jurisdiction upon Chiarappa by the State of New York. Thus, this issue is a red herring designed to distract from the issues at hand and Forever Cheese presented no legal basis for its relevancy to the motion before the Court.

Sini's declaration regarding Chiarappa's alleged targeting of customers in New York is also refuted by Forever Cheese's own documents. Sini alleged that Chiarappa targeted New York via communications with Conca D'Oro. Again, this is not correct. As Exhibit C to Sini's declaration shows, Chiarappa did nothing more than forward Conca D'Oro's inquiry on to

Forever Cheese for whatever action Forever Cheese chose to take with Conca D'Oro. Ex. A, Chiarappa Declaration, ¶ 9; Ex. D, Marica Chiarappa Tr., pp. 117-19. Interestingly, and not mentioned by Forever Cheese to the Court, but as seen in Sini's own email, Conca D'Oro was already Forever Cheese's client. Ex. A, Chiarappa Declaration, ¶ 9; Ex.D, Marica Chiarappa Tr., pp. 117-19. This in no way demonstrates a targeting of sales to New York by Chiarappa.

As evidenced by Marica Chiarappa's deposition testimony, and discussed in greater detail below, any time she traveled to the United States, and to New York specifically, was for pleasure and as a tourist only. Ex. D, Marica Chiarappa Tr., pp. 29-32, 69, 85-86. Although she did attend a trade show, she did so out of personal interest. *Id.* at p. 97. She did not attend the trade show to represent Chiarappa, and she did not engage in any promotional or marketing activities at the trade show. *Id.* at pp. 29-32, 97, 140-41. Thus, Sini's declaration with respect to Marica's activities at the food shows in New York is incomplete, misrepresents her testimony, and should be disregarded by the Court. Marica's testimony is more credible that than that of Sini because she was produced at a deposition and Forever Cheese had a full opportunity to cross-examine her on these issues.

B. Jeff DiMeo's Declaration Does Not Create a Triable Issue of Fact – Sales of Cheese that Ultimately Ended Up in the United States are De Minimus

The declaration by Jeff DiMeo does not create a triable issue of fact because it is also refuted by the documentary evidence. Chiarappa did not export cheese to the United States. Rather Forever Cheese imported cheese to the United States. *See* Ex. A, Chiarappa Declaration, ¶ 8. Accordingly, at the request of Forever Cheese, Chiarappa did occasionally modify the cheese labels. These modifications were undertaken so that Forever Cheese could import the cheese to the United States, not so that Chiarappa could export cheese. *Id.*

Furthermore, Forever Cheese makes much to do about the total pounds of cheese sold by Chiarappa to Forever Cheese from 2004 through 2012. As Matteo Chiarappa's Declaration demonstrates, these amounts were *de minimus* and did not consist of a substantial portion of Chiarappa's business. *Id.* at ¶¶ 11-12. Forever Cheese alleges that in those eight years, Chiarappa sold 543,620 pounds to Forever Cheese. *See* DiMeo Declaration, Ex. K to Forever Cheese Opposition. In those eight years, Chiarappa sold 77,282,495.5 pounds of cheese worldwide. Ex. A, Chiarappa Declaration, ¶ 11. As shown by the documentary evidence, Chiarappa's sales of cheese to Forever Cheese in New York were zero pounds. All cheese was sold in Italy. *See id. generally.*

Using Forever Cheese's representation that there were 543,620 pounds of cheese sold to Forever Cheese, Chiarappa's sales of cheese to Forever Cheese in Italy, were only 0.7% of its total business for the eight years at issue. *Id.* at ¶ 11. In keeping with the total pounds of cheese sold, the total worldwide invoiced amounts from 2004 to 2012 demonstrate that only 0.7% of the total amounts invoiced reflected addresses of entities in the State of New York, even though the sales took place in Italy. *Id.* at ¶ 12; Ex. D, Marica Chiarappa Tr., p. 90. Even if this cheese was sold in New York (which it was not), 0.7% is a *de minimus* portion of Chiarappa's business and shows that it was not engaging in a systemic and persistent course of business in New York. *UTC Fire & Security Americas Corp., Inc. v. NCS Power, Inc.*, 844 F.Supp.2d 366 (S.D.N.Y. 2012) (court declined to exercise jurisdiction where only a small portion of defendant's revenue was derived from New York); *compare JetBlue Airways Corp. v. Helferich Patent Licensing, LLC*, No. 12-cv-5847, 2013 U.S. Dist. Lexis 28439 (E.D.N.Y. Feb. 28, 2013) (jurisdiction was appropriate where 9.5 % of defendant's revenue was derived from New York).

C. Aaron Kirtz's Declaration Does Not Create a Triable Issue of Fact – No Marketing Trip to Stores in New York

Aaron Kirtz's declaration attempts to paint the picture that Marica Chiarappa traveled to New York to meet with at least eight different stores that sold cheese for the purpose of selling and promoting Chiarappa cheese. Kirtz's declaration is directly refuted by the facts and his own memorandum created contemporaneously with the visit. *See* Ex. A to Kirtz Declaration, Ex. P to Forever Cheese Opposition.

Again, subject to full cross-examination by Forever Cheese, Marica Chiarappa testified that she traveled to New York as a tourist in November 2008 to accompany her friend to the New York Marathon. Ex. D, Marica Chiarappa Tr., p. 69. While she was on her vacation, Sini from Forever Cheese requested that she visit stores which sold Chiarappa cheese with them. *Id.* at p. 72. She testified that she went to see the stores simply to see how the product was displayed. *Id.* at pp. 68, 72-73, 75-76, 81. She did not engage in any selling or promotion of Chiarappa while visiting the stores. *Id.* They spent very little time at each store, which is evidenced by the fact that it would have been physically impossible to spend more than a few minutes in each of eight stores she visited given that the stores stretched from Columbus Circle in Manhattan to Park Slope in Brooklyn and were all visited during business hours in one single day.

Kirtz's declaration repeatedly states that they visited stores to "sell and promote" the sale of Chiarappa products. However, the memo he himself prepared contemporaneously with Marica's visit in 2008 demonstrates just the opposite. They visited Whole Foods Columbus Circle "to show the store to Marica" and "give the buyers a history of the producer." *See* Ex. A to Kirtz Declaration, Ex. P to Forever Cheese Opposition. They visited Zabar's not to promote or sell but to spend "5-10 minutes looking at cheeses they carry." *Id.* They visited Grima to sample cheese and Forever Cheese, not Chiarappa, made a plan to return and set up a demonstration with their cheese. *Id.* At Misono they discussed what Misono was buying from Forever Cheese, not Chiarappa. *Id.* They visited Park Slope Food Coop and "took a tour of the store." *Id.* Finally they visited Whole Foods Union Square, where Kirtz interrupted the employees "so they could pay proper attention to [Forever Cheese's] guest from Italy." *Id.* Thus, Kirtz's own memo refutes his current contention that visit was to "promote and sell" Chiarappa cheese, and the Court should reject the same as being self-serving and untrue.

In addition to the foregoing, the sheer number of visits made, from Columbus Circle to Brooklyn during the day, belies any suggestion that they were to "promote and sell" cheese. No more than a few minutes could be spent at any one store (which is confirmed by the memo) and no realistic "promotion and sale" activities could be affected in that brief time period.

III. The Case Law Cited by Forever Cheese Is Inapplicable to the Facts Before the Court

This Court cannot exercise personal jurisdiction over Chiarappa, an Italian corporation with its principal place of business in Italy, because there is no general[2] or specific[3] jurisdiction over Chiarappa.

Out the outset the Court should note that Forever Cheese has failed to establish that any of the cheese it purchased from Chiarappa in Italy ever actually entered New York. Forever Cheese has not produced a single document, and none of the affidavits even suggest that any cheese touched the jurisdictional boundaries of New York. It is irrefutable that they store their cheese in a New Jersey warehouse. *See* Ex. C, Ciano Declaration. The specific cheese alleged to be at issue in this case was purchased at a Whole Foods in Pittsburgh, Pennsylvania, so that does not assist Forever Cheese in making out their prima facie case of jurisdiction in New York. Thus, not only were there no sales in New York, there is no evidence establishing that the product was ever even in New York.

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[2] Chiarappa, a foreign corporation, may be subject to New York's general jurisdiction and be amenable to suit on any cause of action in New York if it has sufficient continuous and systematic contacts to be considered "present" in New York. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011).

[3] Chiarappa may be subject to New York's specific, long-arm jurisdiction based on certain minimum contacts it has with New York, if the cause of action alleged specifically arises out of or relates to its New York contacts. *See generally* CPLR § 302.

A. No General Jurisdiction

For the sake of brevity, we respectfully refer the Court to the arguments set forth in Chiarappa's moving papers, but will address a few key points here. "Under New York law, a foreign corporation is subject to general personal jurisdiction in New York if it is 'doing business' in the state." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (*citing* CPLR § 301). As cited in Forever Cheese's own papers, general jurisdiction is often evaluated by whether or not the defendant has a "fair measure of permanence and continuity" as evidenced by an office in New York, the solicitation of business in New York, the presence of bank accounts or property in New York and the presence of employees in New York. *Li v. Hock*, 371 Fed.Appx. 171, 174 (2d Cir. 2010). As set forth above and in Chiarappa's moving papers, it is undisputed that none of those factors are present in New York with respect to Chiarappa. Chiarappa does not have any permanent or continuous business relationship with New York as Chiarappa has made no sales to New York. All sales made between the two parties were completed in Italy as shown in the documentary evidence. *See* Ex. A, Chiarappa Declaration.

The lack of a permanent or continuous business relationship is evidenced by the fact that only 0.7% of Chiarappa's total invoiced amounts for the entire world from 2004 to 2012 were from invoices reflecting addresses of entities in the State of New York, even though all of those sales were finalized in Italy. Ex. 3 to Ex. A, Chiarappa Declaration, ¶ 12. In a case cited by

Forever Cheese, the Court declined to exercise general jurisdiction where only a small percentage of the defendant's revenue was derived from New York, even though it had other clearly recognizable contacts with the State. *UTC Fire & Security Americas Corp., Inc.,* 844 F.Supp.2d 366. 0.7% is less than one percent and fits squarely within the example where it is improper to exercise general jurisdiction based on such an alleged *de minimus* contact with the State of New York.

Again, Forever Cheese is misleading the Court in its citation of *JetBlue Airways Corp.,* 2013 U.S. Dist. Lexis 28439. In *JetBlue* this Honorable Court found that there was jurisdiction over an out-of-state defendant given the number of licenses from, correspondence to, and revenue from the State of New York. Notably the Court pointed out that the defendant derived 9.5% of its revenue from New York companies. Here, 0.7% of Chiarappa's invoiced amounts are from invoices reflecting addresses of entities in New York, and even though those invoices reflect New York addresses, the sales were made in Italy. The two factual scenarios are not analogous, and the less than one percent does not show an alleged systematic and continuous business relationship with New York such that exercising general jurisdiction is appropriate.

B. No Personal Jurisdiction

In keeping with the above, Chiarappa respectfully refers the Court to the law as set forth in its moving papers and only addresses specific issues requiring rebuttal below.

"Under § 302(a)(1), a non-domiciliary defendant is subject to personal jurisdiction if he transacts business in New York and the claims against him arise out of that business activity." *Pincione v. D'Alfonso,* 506 Fed.Appx. 22, 24 (2d Cir. 2012) *citing Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006). The Court should look to the totality of a defendant's conduct and activities in New York. *Id.* at 25, *citing Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.,* 98 F.3d 25, 29 (2d Cir. 1996).

The totality of Chiarappa's conduct and activities in New York is zero. Chiarappa has not sold to New York, as all sales were made and finalized in Italy. While emails and telephone contact are generally insufficient to establish jurisdiction without more, here the communications, made primarily in Italian, show that Forever Cheese bought cheese from Chiarappa "FCA" that was delivered to Forever Cheese's possession in Milan. *Id.* at 24, *citing Ehrenfeld v. Bin Mahfouz,* 9 N.Y.3d 501, 508 (N.Y. 2007); *Gap, Inc. v. Stone Int'l Trading, Inc.,* No. 93 Civ. 0638 (SWK), 1994 U.S. Dist. LEXIS 16999, at *7 (S.D.N.Y. Nov. 30, 1994); *see* also discussion *supra* and annexed Declarations regarding lack of sales to New York. There is no documentary evidence of sales to or in New York. There is no documentary evidence showing that the product ever even entered New York.

As discussed *supra*, Marica Chiarappa visited New York as a tourist and attended a few trade shows only to observe. Ex. D, Marica Chiarappa Tr., pp. 29-32, 69, 85-86. She did not engage in any marketing or promotional activities at the trade shows. *Id.* at pp. 29-32, 97, 140-41. Furthermore, Marica's visits to stores in New York were again only for observation as established by Kirtz's memorandum from 2008 that refutes his self-serving affidavit that was improperly submitted in an attempt to create an issue of fact before the Court. *Id.* at pp. 68, 72-73, 75-76, 81.

Also, while Forever Cheese places great emphasis on Sini being the registered FDA agent, they have not presented any details or information as to what, if anything, Sini did on behalf of Chiarappa. Furthermore, Forever Cheese has adduced no evidence that the *federal* registration of the FDA agent involved any more than that – registering, or that it had any connection to the State of New York. Forever Cheese has also failed to present any case law supporting their argument that this act of registering with a federal agency, not a State of New York agency, is sufficient to establish personal jurisdiction in New York. This argument is without merit.

Finally, Forever Cheese would have this Court believe that Chiarappa derives substantial revenue from the State of New York. Forever Cheese neglected to inform the Court as to what percentage of Chiarappa's invoiced amounts allegedly related to New York despite being provided with that information in discovery responses. Forever Cheese prefers to rely on a number $1.5 million as the sales to New York, whereas the discovery responses clearly state that the invoiced amounts to an entity with an address in New York from 2004 to 2012 were €1,145,830.55.[4] Ex. 3 to Ex. A, Chiarappa Declaration. As the Court is already aware that amount is only 0.7% of Chiarappa's worldwide invoiced amounts. *Id.* Accordingly, Chiarappa has not engaged in any transactions with the State of New York to make personal jurisdiction appropriate under CPLR § 302(a)(1).

For the same reasons as set forth above, personal jurisdiction under CPLR § 302(a)(3) is inapplicable. Forever Cheese has failed to make out a prima facie case that Chiarappa regularly did business in the State of New York. Chiarappa did not expect to be hauled into court here. Being hauled into Court in New York was not reasonably foreseeable because Chiarappa did not do business in New York. This is unequivocally demonstrated by the Chiarappa invoices to Forever Cheese which explicitly state that all disputes shall be decided before the courts of Bari, Italy. Area "D" of Ex. 1 to Ex. A, Chiarappa Declaration. When there is a forum selection

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4 While these two amounts are close in value based on the exchange rate as of the date of this motion, the invoiced amounts are from 2004 to 2012, a time period during which the Euro to Dollar value fluctuated greatly. Thus, Forever Cheese's $1.5 million representation is inaccurate and misleading.

clause between two sophisticated business entities, the expectation is that it will be enforced. *Russbeer Int'l LLC v. OAO Baltika Brewing Co.*, 07-cv-1212, 2008 U.S. Dist. Lexis 25471, at *12 (E.D.N.Y. Mar. 31, 2008) (there is a presumption of enforceability of forum selection clauses between sophisticated business entities). The forum selection clause does not raise any expectation of being sued in New York.

Forever Cheese's citation of *Hamilton v. Accu-Tek*, 32 F.Supp.2d 47 (E.D.N.Y. 1998) is misplaced. As this Court found in *Accu-Tek*, the mere foreseeability that a product could end up in New York is insufficient to establish jurisdiction without also showing a purposeful act to directly or indirectly serve the New York market. *Id.* Here, as has been previously explained, all sales were completed in Italy and Chiarappa had no further contact with the product after transferring ownership of it to Forever Cheese in Milan, Italy. Even though Chiarappa knew that Forever Cheese had a mailing address in New York, it had no knowledge of what Forever Cheese did with its product once it was placed in the container in Milan, Italy. Ex. A, Chiarappa Declaration, ¶¶ 3-5, 8. As previously stated, there is no evidence before this Court that the product ever entered the State of New York. There is no evidence that Chiarappa has any knowledge of who Forever Cheese sells its products to and thus, it was not foreseeable that the product would find its way to New York. In fact, the product at issue in this specific case, "did not find its way to New York;" it was sold in Pennsylvania.

Forever Cheese's citation of *Kernan v. Kurz-Hastings, Inc.*, 997 F.Supp. 367 (W.D.N.Y. 1998), and the related case law, such as *Halas v. Dicks Sporting Goods,* 105 A.D.3d 1411 (4th Dep't 2013), are inapplicable as they apply to cases where exclusive distributorship agreements were in place. Forever Cheese does not even allege that there is an exclusive distributorship between Forever Cheese and Chiarappa in this case. The Court should disregard these arguments in their entirety.

Finally, the *Cleopatra Kohlique, Inc. v. New High Glass, Inc. v. Fital Di Richetta Paola & C.S.A.S.*, 652 F.Supp. 1254 (E.D.N.Y. 1987), case is readily distinguishable from the case at hand. First the court found that the two parties disputing jurisdiction had a contract, which does not exist in the case at hand. *Id.* at 1257. In *Cleopatra*, the court found that there was evidence that the third-party defendant knew the goods were being shipped to New York. *Id.* Here, as set forth above, Chiarappa did not ship the goods out of Italy, Forever Cheese did. Thus, Chiarappa did not know where the goods were going. Ex. A, Chiarappa Declaration, ¶ 5. Forever Cheese's argument that Chiarappa knew where the goods were going to New York because of a Long Island City mailing address is unfounded. Accordingly, it is undisputed that Chiarappa did not know where the cheese was going, unlike the third-party defendant in *Cleopatra*, and Forever Cheese has failed to establish where the cheese actually went, aside from a warehouse in New Jersey. *Cleopatra* is distinguishable and not a binding opinion this Court and therefore, jurisdiction over Chiarappa is not appropriate.

C. Due Process – No Minimum Contacts

As detailed in Chiarappa's moving papers and explained above, Chiarappa did not have sufficient minimum contacts with the State of New York such that jurisdiction is appropriate under a Due Process Clause analysis. Chiarappa did not sell or ship to New York and Chiarappa did not know where Forever Cheese was shipping or selling the cheese it bought from Chiarappa in Italy. *See* Ex. A, Chiarappa Declaration. There are no minimum conflicts to satisfy the Due Process standard.

D. Jurisdiction Over Chiarappa is Unreasonable and Does Not Comport With Notions of Fair Play and Substantial Justice[5]

Finally, jurisdiction in New York does not comport with notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310; 316 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985). The Court must look at the extent to which the lawsuit relates to Chiarappa's activities, the availability of evidence and the location of witnesses, the availability of an alternative forum, the relative costs and burdens of litigants and state policy in providing a forum for this litigation. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The Court's evaluation of these factors here as they apply to an Italian Third-Party Defendant results in the conclusion that the Eastern District of New York is not the proper forum for this matter. While the burdens of an Italian company litigating in New York are obvious, Forever Cheese can show little legitimate interest in forcing Chiarappa to undertake that burden when the alleged wrongdoing is alleged to have occurred in Italy, not in New York. All of the evidence and witnesses to that alleged wrongdoing are in Italy. Moreover, there can be no state policy favoring litigation in New York with an Italian company that has no activities with New York and where the alleged injury occurred in Pittsburgh, Pennsylvania.

Most importantly in this analysis, the invoices from Chiarappa to Forever Cheese contain a forum selection clause which states that all disputes are to be litigated before a court in Bari, Italy. Area "D" of Ex. 1 to Ex. A, Chiarappa Declaration. Forever Cheese at no time objected to this portion of the invoices. Ex. A, Chiarappa Declaration, ¶ 14. Thus, when considered in conjunction with the other factors, this forum selection clause provides an alternative location to

[5] All of the evidence and arguments presented herein are properly before the Court in this Reply Memorandum as they are submitted to rebut the arguments of Forever Cheese as raised in their opposition papers.

resolve this dispute and weighs in favor of finding that the Eastern District of New York is not the proper forum for this dispute. *Russbeer Int'l LLC,* 2008 U.S. Dist. Lexis 25471. Thus, the exercise of jurisdiction over Chiarappa would be unreasonable and would offend traditional notions of fair play and substantial justice.

IV. Conclusion

Wherefore, for the reasons set forth above, Chiarappa respectfully requests that the Court grant its motion for summary judgment and dismiss all claims against it.

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Respectfully submitted,

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